

ORDINANCE NO. 13-2010

**AN ORDINANCE OF THE CITY OF FREMONT AMENDING
ARTICLE 21.7 OF FREMONT MUNICIPAL CODE TITLE VIII
(PLANNING AND ZONING), CHAPTER 2 (ZONING)
REGARDING INCLUSIONARY/AFFORDABLE HOUSING**

THE CITY COUNCIL OF THE CITY OF FREMONT DOES ORDAIN AS FOLLOWS:

SECTION 1. FMC ARTICLE 21.7, §§8-22170 – 8-22179 AMENDED.

Fremont Municipal Code Title VIII, Chapter 2, Article 21.7 is amended to read as follows:

Sec. 8-22170. Basis and purposes.

In enacting this ordinance, the city finds as follows:

(a) The Legislature of the State of California has found that the availability of housing is of vital statewide importance, and that providing decent housing for all Californians requires the cooperative participation of government and the private sector. The Legislature has further found that local governments have a responsibility to use the powers vested in them to make adequate provisions for the housing needs of all economic segments of the community. This ordinance is intended to utilize the police powers of the city to enhance the public welfare by making adequate provision for the housing needs of all economic segments of the community through the cooperative participation of government and the private sector. This ordinance will also assist in meeting the city's share of the region's housing needs and will implement the goals, policies, and actions specified in the housing element of the general plan.

(b) The housing element of the city's general plan, adopted on July 14, 2009, concluded that:

- (1) The shortage of affordable housing is one of the greatest challenges facing the San Francisco Bay Area. The region's housing costs are among the highest in the nation, potentially threatening its future economic vitality, environment, and quality of life.
- (2) To provide its fair share of the region's housing needs, the city must have adequate sites for 4,380 housing units for the period from 2007 to 2014, including sites for 701 extremely low income units, 647 very low income units, 887 low income units, and 876 moderate income units.
- (3) Fremont needs new housing to survive as a healthy city and to accommodate additional workers in its industrial and commercial areas, as well as housing for those serving the local economy. In recent years, most of the new homes constructed have been affordable to only a small fraction of the city's population and workforce. Between 1999 and 2006, the private market did not construct a single unregulated housing unit affordable to households earning extremely low, very low, low, or moderate incomes.

- (4) The city has adopted a goal of encouraging the development of affordable housing to help meet the city's assigned share of the regional housing need and has adopted a policy of encouraging the development of a diverse housing stock that provides a range of affordability levels. To implement this goal, the city has committed to consideration of modifications to this ordinance to increase opportunities for developers to pay fees rather than provide units and to expand the uses of these fees to better serve the housing needs of extremely low, very low, and low income households. The provisions of this ordinance meet this goal by increasing opportunities for developers to pay fees rather than provide units.
- (c) Federal and state government programs do not provide nearly enough affordable housing or subsidies to satisfy the housing needs of moderate, low, very low, and extremely low income households.
- (d) Land prices are a key factor preventing development of new affordable housing. New housing construction in the city which does not include affordable units aggravates the existing shortage of affordable housing by absorbing the supply of available residential land. This reduces the supply of land for affordable housing and increases the price of remaining residential land. Providing the affordable units required by this article will help to ensure that part of the city's remaining developable land is used to provide affordable housing. At the same time, new market-rate housing contributes to the demand for goods and services in the city, increasing local service employment at wage levels which often do not permit employees to afford housing in the city. Providing the affordable units required by this article will help to ensure that part of the city's remaining developable land is used to provide affordable housing. The "Residential Nexus Analysis, Inclusionary Housing Ordinance, Fremont, California" study, dated April 2010 (the "Nexus Study"), prepared by Keyser-Marston Associates, Inc., quantifies the impacts of new market-rate units on the need for affordable housing in the city.
- (e) An economically balanced community is only possible if part of the new housing built in the city is affordable to households with limited incomes. Requiring builders of new for-sale housing to include some housing affordable to households at a range of incomes is fair, not only because new development without affordable units contributes to the shortage of affordable housing but also because zoning and other ordinances concerning new housing production in the city should be consistent with the community's goal of fostering an adequate supply of housing for households at all affordability levels and should address the need for affordable housing related to market-rate housing production.
- (f) In general, affordable units within each housing development would serve the goal of maintaining an economically balanced community. However, collection of fees from for-sale projects, in-lieu of on-site construction of affordable housing, may provide a greater number of housing units that are affordable to households with extremely low, very low, and low incomes. Construction of required affordable units off-site and other alternatives to on-site construction may also provide affordable housing units. Consequently, the city desires to increase opportunities for utilizing in-lieu fees or off-site construction alternatives. The in-lieu fee option may be used in for-sale projects and is a generally applicable menu option that may be selected by an applicant as an alternative to on-site construction. It is not a mandated

fee required as a condition to developing property, nor is it a fee subject to the analysis in *Building Industry Association of Central California v. City of Patterson*, 171 Cal.App.4th 886 (2009).

(g) A 2009 decision of the California Court of Appeal holds that the city may not require rents to be limited in rental projects unless the city provides assistance to the rental project. To conform with this decision, this ordinance does not require any rental project, except those rental projects that receive city assistance, to limit rents or to pay an in-lieu fee. Instead, consistent with the results of the Nexus Study, market-rate rental projects are required to pay an affordable housing impact fee to mitigate the impacts of those rental projects on the need for affordable housing. The affordable housing impact fee is reasonably related to the need for affordable housing associated with market-rate rental housing.

(h) The city is now experiencing the loss of affordable housing due to the expiration of covenants restricting rents in some affordable housing developments. In-lieu fees and affordable housing impact fees may provide a source of financing to enable the city to preserve existing affordable housing that would otherwise be lost. Similarly, such fees may provide a source of financing for supportive social and other services that must often be provided for residents of affordable housing to ensure that the residents have adequate support and assistance to remain in their homes.

(i) The limited production of rental housing and the displacement of rental housing units through conversions to residential condominiums reduce the city's rental housing supply, which causes increased rental housing costs and decreased housing affordability. The provision of affordable units within residential condominium conversion projects provides affordable housing ownership opportunities that help offset the loss of rental affordable units.

Sec. 8-22171. Definitions.

(a) *Affordable ownership cost.* A sales price resulting in projected average monthly housing payments, during the first calendar year of a household's occupancy, including interest, principal, mortgage insurance, property taxes, homeowners insurance, homeowner's association dues, if any, and a reasonable allowance for utilities, property maintenance, and repairs, not exceeding the following:

- (1) *Moderate income households:* One hundred ten percent of the area median income, adjusted for assumed household size based on unit size, multiplied by thirty-five percent and divided by twelve.
- (2) *Low income households:* Seventy percent of the area median income, adjusted for assumed household size based on unit size, multiplied by thirty percent and divided by twelve.

The city may determine sales prices of affordable units by any reasonable method so long as average monthly housing payments of eligible households do not exceed those permitted by this subsection (a).

(b) *Affordable rent.* Monthly housing expenses, including all fees for housing services

and a reasonable allowance for utilities, not exceeding the following:

- (1) *Very low income households.* Fifty percent of the area median income, adjusted for assumed household size based on unit size, multiplied by thirty percent and divided by twelve.
 - (2) *Low income households.* Sixty percent of the area median income, adjusted for assumed household size based on unit size, multiplied by thirty percent and divided by twelve.
- (c) *Affordable units.* Living units which are required under this article to be rented at affordable rents or available at an affordable ownership cost to eligible households.
- (d) *Area median income.* Median income for Alameda County, adjusted for household size, as published pursuant to California Code of Regulations, Title 25, Section 6932 (or its successor provision).
- (e) *Assumed household size.* One person in a studio apartment, two persons in a one bedroom unit, three persons in a two bedroom unit, and one additional person for each additional bedroom thereafter, unless a federal standard applicable to the development requires the use of a different assumed household size, in which case the federal standard shall apply.
- (f) *Construction cost index.* The Engineering News Record McGraw-Hill Construction Weekly Building Cost Index for San Francisco. If that index ceases to exist, the community development director shall substitute another construction cost index which in his or her judgment is as nearly equivalent to the original index as possible.
- (g) *Eligible household.* A household whose household income does not exceed the maximum specified for a very low, low, or moderate income household defined in subsection (i), as applicable for a given affordable unit.
- (h) *First approval.* The first of the following approvals to occur with respect to a residential project: planned district approval, subdivision approval, conditional use permit, site plan and architectural approval, other discretionary land use approval, building permit.
- (i) *For-sale project.* A residential project, or portion thereof, that includes the creation of one or more residential living units that may be sold individually, including a condominium, stock cooperative, community apartment, or attached or detached single-family home. A for-sale project also includes a residential condominium conversion project as defined in Section 8-22135.
- (j) *Household income.* The combined adjusted gross income for all adult persons living in a living unit as calculated for the purpose of the Section 8 Program under the United States Housing Act of 1937, as amended, or its successor provision.
- (1) *Low income household.* A household whose income does not exceed the lower income limits pursuant to the published standard.

- (2) *Moderate income household.* A household whose income does not exceed the moderate income limits pursuant to the published standard.
- (3) *Very low income household.* A household whose income does not exceed the very low income limits pursuant to the published standard.
- (k) *Living unit.* One or more rooms designed, occupied, or intended for occupancy as separate living quarters, with cooking, sleeping, and bathroom facilities.
- (l) *Market-rate units.* New living units in residential projects which are not affordable units under subdivision (c) of this section.
- (m) *Planning area.* A geographic boundary identified within the city's general plan.
- (n) *Published standard.* The standard for a specified income level for Alameda County, as published pursuant to California Code of Regulations, Title 25, Section 6932 (or its successor provision) and adjusted for household size.
- (o) *Redevelopment project subarea.* Individually, either the Irvington Redevelopment Project Area, the Niles Redevelopment Project Area, the Centerville Redevelopment Project Area, or the Industrial Redevelopment Project Area, all of which have been merged to comprise the Fremont Merged Redevelopment Project Area.
- (p) *Rental project.* A residential project, or portion thereof, that creates living units that cannot be sold individually, except that construction of any secondary dwelling unit as defined in Section 8-22159.5 shall not be considered a rental project.
- (q) *Residential project.* Any project containing two or more net new living units or residential lots, or living units and residential lots which total two or more net new units and/or lots in combination, built pursuant to, or contained in an application for a planned district, subdivision map, conditional use permit, site plan and architectural approval, other discretionary city land use approval, or building permit. Contemporaneous construction of two or more living units on a lot, or on contiguous lots for which there is evidence of common ownership or control, even though not covered by the same city land use approval, shall also be considered a residential project. Construction shall be considered contemporaneous for all units which do not have completed final inspections for occupancy and which have outstanding, at any one time, any one or more of the following: planned district, subdivision map, conditional use permit, site plan and architectural approval, or other discretionary city land use approvals, or building permits, or applications for such an approval or permits. A residential condominium conversion project as defined in Section 8-22135 is considered a residential project and is subject to this article. The provisions of this section shall be interpreted broadly to effect the purposes of this ordinance and to prevent evasion of its terms.

Sec. 8-22172. Basic requirement.

- (a) The following basic requirements apply to all for-sale projects unless an alternative is approved pursuant to Section 8-22177:

- (1) At least fifteen percent of all living units in any for-sale project shall be made available at affordable cost as prescribed in Section 8-22175(a). Effective January 1, 2015, at least twenty percent of all living units in any for-sale project shall be made available at affordable cost as prescribed in Section 8-22175(a), provided that the city council finds that a nexus study quantifying the impacts of new market-rate units on the need for affordable housing supports a twenty percent affordability requirement. If the city council does not make this finding, then at least fifteen percent of all living units shall continue to be offered at affordable cost as prescribed in section 8-22175(a).
- (2) For the purpose of calculating the number of affordable units required by subsection (a)(1), any secondary dwelling units as defined in Section 8-22159.5 and any additional units authorized as a density bonus pursuant to Article 21.8 shall not be counted as part of the for-sale project.
- (3) Affordable units provided pursuant to subsection (a)(1) or provided pursuant to one of the alternative actions set forth in Section 8-22177 shall be approved and completed no later than the times prescribed in Section 8-22174.
- (4) For fractions of affordable units required in for-sale projects, the owner may either construct an additional affordable unit or pay an in-lieu fee for the fractional unit as prescribed by Section 8-22177(f).
- (b) The following basic requirements apply to all rental projects:
 - (1) For rental projects receiving no city assistance, affordable housing impact fees shall be paid at the time specified in Section 8-22174 to mitigate the rental project's impact on the need for affordable housing in the city, except that no affordable housing impact fee need be paid for living units which are subject to a rent regulatory agreement with a term of fifty-five years and which are required to be rented at affordable rents to very low or low income households.
 - (2) For rental projects for which the applicant requests and receives a direct city financial contribution or any form of assistance specified in Chapter 4.3 (commencing with Section 65915) of Division 1 of Title 7 of the Government Code, affordable housing may be required by the city pursuant to the terms of that assistance. If affordable housing is required, the city shall require, as a condition of city assistance, that the affordable housing developer agreement and rent regulatory agreement include the applicant's agreement to any limitation on rents in consideration for the city's assistance, to ensure compliance with the Costa-Hawkins Act (Chapter 2.7 of Title 5 of Part 4 of Division 3 of the Civil Code).

Sec. 8-22173. Incentives.

(a) Residential projects that include affordable units in compliance with this article and that do not request a density bonus or other incentives pursuant to Article 21.8 may receive the following incentives:

- (1) Subject to approval of the community development director or designee, affordable

units may have different interior finishes and features than market-rate units in the same residential project, so long as the finishes and features are durable, of good quality and consistent with contemporary standards for new housing. Notwithstanding the above, all such units shall meet the criteria set forth in Section 8-22175(b).

- (2) In a residential project which contains single-family detached homes, affordable units may be attached living units rather than detached homes, and in a residential project which contains attached multi-story living units, affordable units may contain only one story.

(b) Residential projects that include affordable units in compliance with this article and request a density bonus or other incentives pursuant to Article 21.8 may receive incentives as specified in Article 21.8.

Sec. 8-22174. Time performance required.

(a) No building permit shall be issued for any market-rate unit in a for-sale project until the permittee has either: (1) obtained permits for affordable units in the for-sale project sufficient to meet the requirements of Section 8-22172; (2) paid in-lieu fees if approved pursuant to Section 8-22177(f); or (3) received certification from the community development director that the permittee has met, or made arrangements satisfactory to the city to meet, an alternative requirement of Section 8-22177. No final inspection for occupancy for any market-rate unit in a for-sale project shall be completed until the permittee has either constructed the affordable units required by Section 8-22172, or completed corresponding alternative performance under Section 8-22177. The time requirements set forth in this subsection for issuance of building permits for market-rate units and for final inspections for occupancy of market-rate units may be modified by city council resolution or ordinance. To accommodate phasing schedules, model variations, or other factors in a residential project, the community development director may modify the timing requirements for construction and occupancy of market-rate units if the city determines this will provide greater public benefit, and if an affordable housing developer agreement so provides.

(b) No building permit shall be issued for any living unit in a rental project until the permittee has paid affordable housing impact fees for that unit, if required. For rental projects receiving city assistance, the timing of construction and occupancy of the market-rate units shall comply with the terms specified in consideration for city assistance. The time requirement set forth in this subsection may be modified by city council resolution or ordinance.

(c) An application for the first approval of a residential project shall include an affordable housing plan describing how the project will comply with the provisions of this Article 21.7. The affordable housing plan shall be processed concurrently with all other applications required for the residential project. As an alternative to compliance with the basic provisions included in Section 8-22172, an applicant for a for-sale project may propose one of the alternatives listed in Section 8-22177 as part of the affordable housing plan.

(d) The affordable housing plan shall be considered by and acted upon by the approval

body with authority to approve the residential project. Before approving the affordable housing plan, the approval body shall find that the affordable housing plan conforms to this Article 21.7. The approval body may approve an alternative listed in Section 8-22177 if the alternative conforms to the standards in the relevant subsection of Section 8-22177.

(e) Conditions to carry out the purposes of this article shall be imposed on the first approval for a residential project. Additional conditions regarding the approved affordable housing plan may be imposed on later city approvals or actions, including without limitation planned district approvals, subdivision approvals, conditional use permits, and building permits.

(f) The approved affordable housing plan for a residential project, or for a building phase in a residential project, where phasing has been approved as part of discretionary project approvals, may be amended prior to issuance of any building permit for the residential project or building phase, if applicable. The applicant may elect to pay in-lieu fees pursuant to Section 8-22177(f). If the applicant desires any other modification to the approved affordable housing plan, that modification shall be acted upon by the approval body that previously approved the affordable housing plan.

(g) For residential projects approved prior to the effective date of this ordinance, July 15, 2010, any affordable housing requirements may be amended prior to issuance of any building permit for the residential project or building phase, if phasing was approved as part of discretionary project approvals. If the project was required to provide fifteen percent of the units as affordable to moderate-income households, the applicant may elect to pay in-lieu fees pursuant to Section 8-22177(f). For all other projects, or if the applicant desires any other modification to the approved affordable housing plan, any proposed modification shall be acted upon by the approval body that previously approved the affordable housing plan. The provisions of this article are applicable to all properties which have not received a building permit or other vested right prior to the effective date of this ordinance, July 15, 2010.

Sec. 8.22175. Requirements for affordable units.

(a) The affordable units which are constructed in for-sale projects shall be sold at affordable ownership cost to moderate income households to households whose incomes do not exceed one hundred and ten percent of area median income, adjusted for household size, provided that such units may be sold to any moderate income household when the community development director determines that a household income limit up to one hundred and twenty percent of area median income is necessary to secure households able to qualify for mortgages to purchase the units. The city council, by resolution, may from time to time establish affordable ownership cost in compliance with the requirements of this article and based on reasonably available data.

(b) Affordable units shall be comparable in overall number of bedrooms, proportion of units in each bedroom category, quality of exterior appearance and overall quality of construction to market-rate units in the same residential project. Overall unit size should be generally representative of the unit sizes within the market-rate portion of the development

and acceptable to the community development director or designee. Interior features and finishes in affordable units shall be durable, of good quality and consistent with contemporary standards for new housing. Where affordable units are provided on site, the affordable units shall be dispersed throughout the residential project in a manner acceptable to the city.

Sec. 8-22176. Continued affordability; city review of occupancy.

(a) In for-sale projects, affordable housing developer agreements acceptable to the community development director shall be recorded against the for-sale project prior to approval of any final or parcel map or issuance of any building permit, whichever occurs first. However, if the project's affordable housing obligation will be met entirely through the payment of in-lieu fees approved pursuant to Section 8-22177(f), no affordable housing developer agreement need be recorded.

(b) If the affordable units are designated for owner occupancy, resale restrictions, deeds of trust and/or other documents acceptable to the community development director, all consistent with the requirements of this article, shall be recorded against the affordable units prior to sale of the units.

(c) The forms of affordable housing developer agreements, resale restrictions, deeds of trust, and/or other documents authorized by this article, and any change in the form of any such document which materially alters any policy in the document, shall be approved by the city attorney and the community development director prior to being executed with respect to any residential project.

(d) The documents required by subsection (b) shall be for a term of thirty years, except that, effective January 1, 2013, these documents shall be for a term of forty-five years. The required term of affordability in any residential project shall be determined as of the date that the application for the first approval for the residential project is deemed complete by the city. In the case of ownership affordable units which are transferred during the required term, renewed restrictions shall be entered into on each change of ownership, with a thirty or forty-five year renewal term, as applicable on the date that the renewed restrictions are entered into.

(e) Affordable units which are initially owner-occupied shall not be rented by the owner, except in cases of substantial hardship including, but not limited to, active military duty and illness, and on specified terms as provided in a resale restriction agreement or other agreement acceptable to the community development director.

(f) The maximum sales price permitted on resale of an affordable unit designated for owner-occupancy shall be the lower of: (1) fair market value or (2) the seller's lawful purchase price, increased by the rate of increase of area median income during the seller's ownership. The sales price may also be modified to account for capital improvements made by the seller, deferred maintenance, and the seller's necessary costs of sale. The resale restrictions shall provide an option to the city to purchase any affordable owner-occupancy unit at the maximum price which could be charged to a purchaser household, at any time the

owner proposes sale.

(g) No household shall be permitted to begin occupancy of a unit which is required to be affordable under this article unless the city has approved the household's eligibility, or has failed to make a determination of eligibility within the time or other limits provided by an affordable housing developer agreement, rent regulatory agreement, or resale restrictions. If the city maintains a list of, or otherwise identifies, eligible households, initial and subsequent occupants of affordable units shall be selected first from the list of identified households, to the maximum extent possible, in accordance with rules approved by the community development director.

(h) If the city has failed to identify an eligible buyer for initial sale of an affordable unit which is intended for owner-occupancy ninety days after the unit receives a completed final inspection for occupancy, upon ninety additional days' notice to the city and on satisfaction of such further conditions as may be included in city-approved restrictions (such as a further opportunity to identify an eligible buyer, sale to a non-profit affordable housing organization, or additional marketing by owner), the owner may sell the unit at a fair-market value and shall pay the city the greater of the following:

- (1) An amount equal to the difference between the sales price and the affordable ownership cost; or
- (2) An amount equal to the in-lieu fee for seven (7) market-rate units, based on the average square footage of living units in the residential project.

The amount paid to the city shall be deposited into the City of Fremont Housing fund. After such a sale, the unit shall not be subject to any requirement of this article.

Sec. 8-22177. Alternatives.

As an alternative to compliance with the other provisions of this article, an applicant may propose one of the following alternatives as part of its affordable housing plan submitted with the first approval of a for-sale project. The alternatives in this section are not applicable to rental projects. The approval authority may approve the alternative if the alternative conforms to the standards in the relevant subsection.

(a) *Provision of rental units.* Where ownership affordable units are required by Section 8-22172(a), the applicant may construct as part of the residential project rental units, affordable to moderate, low and very low income households at rents as prescribed in subsection (a)(1) below. To ensure compliance with the Costa-Hawkins Act (Chapter 2.7 of Title 5 of Part 4 of Division 3 of the Civil Code), the affordable housing developer agreement and rent regulatory agreement shall include the applicant's agreement to the limitation on rents required by subsection (a)(1) in consideration for a direct financial contribution or a form of assistance specified in Chapter 4.3 (commencing with Section 65915) of Division 1 of Title 7 of the Government Code.

- (1) At least fifteen percent of all living units in the residential project shall be exclusively offered for rent to moderate, low, and very low income households. Of the living units

in the residential project, at least six percent shall be exclusively offered to very low income households at affordable rents for very low income households, four percent shall be exclusively offered to low income households at affordable rents for low income households, and five percent shall be exclusively offered to moderate income households at affordable rents for moderate income households. The rent regulatory agreement shall be for a term of fifty-five years. The city council, by resolution, may from time to time establish affordable rents in compliance with the requirements of this article and based on reasonably available data.

- (2) The rental units shall be either : (1) equal in number of bedrooms to the owner-occupied units which would have been required, or (2) any comparative deficiency in bedrooms shall be compensated for by either at least ten percent more affordable units than required under subsection (a)(1) above, or units shall be affordable to households in a lesser income category than required under subsection (a)(1) (for example, very low income units rather than low income units).
 - (3) A rent regulatory agreement acceptable to the community development director, consistent with the requirements of this article, shall be recorded against the residential project prior to any final inspection for occupancy of any living unit in the residential project.
 - (4) The rent regulatory agreement shall include provisions for sale of the affordable units and relocation benefits for tenants of the affordable units if the owner of the residential project later determines to offer any affordable units in the residential project for sale. The owner shall provide all notices to prospective tenants of the residential project required by state law and shall additionally, at the time sale of the units is proposed, provide all tenants of the rental affordable units with the same notices, rights, and relocation benefits as provided by Section 8-22135 for residential condominium conversion projects. The owner shall provide written notice to the city at least ninety days before offering any rental affordable unit for sale. The owner shall provide as many ownership affordable units at affordable ownership cost as is required by Section 8-22172(a). At the time of sale, resale restrictions, deeds of trust and/or other documents acceptable to the community development director or the director's designee, all consistent with the requirements of this article, shall be recorded against the ownership affordable units for a term of forty-five years.
- (b) *Off-site construction.* The applicant, or an entity controlled by the applicant, or another entity that has entered into an agreement with the applicant to provide affordable housing, may propose to construct affordable units on another site. The city may grant a credit for off-site construction if the proposal meets all of the following conditions.
- (1) Location of off-site units.
 - (A) If the residential project is located within the Fremont Merged Redevelopment Project Area, the off-site affordable units shall either be located within the same redevelopment project subarea as the residential project; or the off-site affordable units (i) shall be located entirely outside the

Fremont Merged Redevelopment Project Area; (ii) provide equivalent redevelopment affordable housing production credit under Health and Safety Code Section 33413 as would be obtained if the affordable units were located within the Fremont Merged Redevelopment Project Area; and (iii) be located within the same planning area as the residential project.

(B) If the residential project is not located in the Fremont Merged Redevelopment Project Area, the off-site affordable units shall be constructed either within the same planning area as the residential project, within the central business district, or within a one mile radius of an existing rail transit station.

- (2) Financing or a viable financing plan, which may include public funding, shall be in place for the off-site affordable units; and
- (3) Construction of the off-site affordable units may not have commenced prior to the first approval of the residential project.

Final inspections for occupancy of the market-rate units will be granted only after final inspections are completed for the off-site affordable units related to those market-rate units. However, the timing requirements set forth in this subsection may be modified by the community development director to accommodate phasing schedules, model variations, financing requirements, or other factors, if the city determines this will provide greater public benefit, and if an affordable housing developer agreement acceptable to the community development director pursuant to Section 8-22176 so provides. The city may require that completion of off-site affordable units be further secured by the applicant's agreement to pay an in-lieu fee in the amount due under subsection (e) of this section in the event the off-site units are not timely completed.

(c) *Property dedication.* The applicant may propose to dedicate, without cost to the city, property within or contiguous to the residential project sufficient to accommodate at least the required affordable units for the residential project. The city may approve property dedication pursuant to this subsection only if the proposal meets all of the following conditions:

- (1) The number of affordable units to be constructed on the dedicated property shall be at least ten percent greater than the number of affordable units required under Section 8-22172, or the affordable units to be constructed on the dedicated property shall provide units affordable to households in a lesser income category than required under Section 8-22175(a) (for example, low income units rather than moderate income units); and
- (2) If the residential project is located within the Fremont Merged Redevelopment Project Area, the dedicated land shall either be located within the same redevelopment project subarea; or the dedicated land (i) shall be located entirely outside the Fremont Merged Redevelopment Project Area; and (ii) shall provide equivalent redevelopment affordable housing production credit under Health and Safety Code Section 33413 as would be obtained if the affordable units were located within the Fremont Merged

Redevelopment Project Area; and

- (3) Financing or a viable financing plan, which may include public funding, shall be in place for construction of the affordable units on the dedicated property; and
- (4) The property to be dedicated shall be suitable for construction of affordable housing at a feasible cost, shall be served by utilities, streets and other infrastructure, and shall have no hazardous materials or other conditions that constitute material constraints on development of affordable housing on the property.

The property shall be dedicated to the city prior to issuance of any building permit for the residential project.

(d) *Purchase of existing market-rate units.* The applicant may propose to purchase existing market-rate units not subject to any affordability covenants and convert them to affordable housing, or to purchase affordability covenants for existing market-rate units, to provide the affordable housing required by this article. The city may approve a proposal for purchase of existing market-rate units or affordability covenants if the proposal meets all of the following conditions:

- (1) The market-rate units to be converted to affordable units shall either be vacant and foreclosed-upon properties or shall require substantial rehabilitation equal to at least twenty-five percent of the after-rehabilitation value of the property, inclusive of land value; and
- (2) Location of existing market-rate units:
 - (A) If the residential project is located within the Fremont Merged Redevelopment Project Area, the market-rate units to be converted to affordable units shall either be located within the same redevelopment project subarea as the residential project; or the market-rate units to be converted to affordable units (i) shall be located entirely outside the Fremont Merged Redevelopment Project Area; (ii) provide equivalent redevelopment affordable housing production credit under Health and Safety Code Section 33413 as would be obtained if the affordable units were located within the Fremont Merged Redevelopment Project Area; and (iii) be located within the same planning area as the residential project.
 - (B) If the residential project is not located in the Fremont Merged Redevelopment Project Area, the units to be converted to affordable units shall be located either within the same planning area as the residential project, within the central business district, or within a one mile radius of an existing rail transit station; and
- (3) Any existing tenants in the units to be converted to affordable units shall be eligible to remain in the units; or, the applicant shall provide relocation assistance pursuant to Government Code Sections 7260 et seq.; and

- (4) Prior to occupancy of the residential project, the units to be converted to affordable units shall be in decent, safe and sanitary condition and in compliance with all codes.

No building permit shall be issued for any units in the residential project until the applicant has acquired title to the existing market-rate units proposed to be converted to affordable units and has entered into regulatory agreements acceptable to the community development director. If the units are to be converted to affordable rental units, then, to conform with the Costa-Hawkins Act, the regulatory agreement shall include the applicant's agreement to the limitation on rents required by subsection (a)(1) in consideration for a direct financial contribution or a form of assistance specified in Chapter 4.3 (commencing with Section 65915) of Division 1 of Title 7 of the Government Code.

(e) *Preservation of affordable units at risk of loss.* The applicant may propose to preserve existing affordable units at risk of loss to provide the affordable housing required by this article. The city may approve preservation of affordable units at risk of loss pursuant to this subsection only if the proposal meets all of the following conditions:

- (1) The affordable units to be preserved shall be affordable to low income and very low income households. If the affordable units to be preserved are located within the Fremont Merged Redevelopment Project Area, at least fifty (50) percent of the units to be preserved shall be affordable to very low income households; and
- (2) The term of affordability shall be extended for a minimum of fifty-five (55) years for rental affordable units and for a minimum of forty-five (45) years for ownership affordable units; and
- (3) The affordable units to be preserved shall be shown as at risk of loss in the housing element of the city's general plan, or the city council must find at a public hearing that the affordable units are eligible to, and reasonably expected to, convert to market-rate units in the next five years due to termination of subsidy contracts, mortgage prepayment, or expiration of restrictions on use; and
- (4) Location of affordable housing at risk of loss:
 - (A) If the residential project is located within the Fremont Merged Redevelopment Project Area, the affordable units to be preserved shall either be located within the Fremont Merged Redevelopment Project Area; or shall provide equivalent redevelopment affordable housing production credit under Health and Safety Code Section 33413 as would be obtained if the affordable units were located within the Fremont Merged Redevelopment Project Area.
 - (B) If the residential project is not located in the Fremont Merged Redevelopment Project Area, the affordable units to be preserved may be located anywhere within the city; and
- (5) Prior to occupancy of the residential project, the affordable units to be preserved shall be in decent, safe and sanitary condition and in compliance with all codes.

No building permit shall be issued for any units in the residential project until regulatory agreements acceptable to the community development director have been recorded to extend the term of affordability for the affordable units at risk of loss as required by this subsection.

(f) *In-lieu fee.*

- (1) For a for-sale project, the applicant may pay a fee in lieu of construction of affordable units on site. No in-lieu fee shall be imposed on secondary units and density bonus units.
- (2) Fees shall be paid upon issuance of building permits for market-rate units in a residential project and shall be based on the fee schedule in effect at the time the fee is paid, unless these requirements are modified by city council resolution or ordinance. If building permits are issued for only part of a residential project, the fee amount shall be based only on the number of units then permitted.

Sec. 8-22178. Establishment of fees; use.

(a) In-lieu fees and affordable housing impact fees shall be set by city fee resolution or other action of the city council. Fees may be based on a fee per market-rate unit, fee per square foot, or any other reasonable basis. The city council may review the fees from time to time at its sole discretion and may, based on that review, adjust the fee amount. For any annual period during which the council does not review the fee authorized by this subsection, fee amounts shall be adjusted once by the community development director based on the annual percentage increase in the construction cost index.

(b) In-lieu fees shall not exceed the difference between the fair market value of market-rate units and affordable ownership cost at the income levels specified in Section 8-22175(a). It is also the policy of the city that in-lieu fees should not exceed the cost of mitigating the impact of market-rate for-sale projects on the need for affordable housing in the city. Fees paid for fractional units pursuant to Section 8-22172(a)(4) shall be based on the in-lieu fee paid for the average market-rate unit in the residential development.

(c) Affordable housing impact fees shall not exceed the cost of mitigating the impact of market-rate rental projects on the need for affordable housing in the city.

(d) All fees collected under this article shall be deposited into a separate account to be designated the City of Fremont Housing Fund.

(e) The fees collected under this article and all earnings from investment of the fees shall be expended exclusively to provide or assure continued provision of affordable housing in the city through acquisition, construction, development assistance, rehabilitation, financing, rent or other subsidies, provision of supportive services, or other methods, and for costs of administering programs which serve those ends. A maximum of ten percent of the Fund may be set aside for rent subsidies and supportive services, where such subsidies and services assist in meeting the housing needs of the city's workforce. A maximum of five percent of the Fund may be used for administrative costs directly related to the provision of affordable housing financed by the fund. The housing shall be of a type, or made affordable at a cost or

rent, for which there is a need in the city and which is not adequately supplied in the city by private housing development in the absence of public assistance and to the extent feasible shall be utilized to provide for low, very low, and extremely low income housing.

Sec. 8-22179. Enforcement.

(a) The city attorney shall be authorized to enforce the provisions of this article and all developer and regulatory agreements and resale controls placed on affordable units, by civil action and any other proceeding or method permitted by law.

(b) Failure of any official or agency to fulfill the requirements of this article shall not excuse any applicant or owner from the requirements of this article.

Sec. 8-22180. Waiver.

As part of an application for the first approval of a residential project, an applicant may apply for a reduction, adjustment, or waiver of the requirements based upon a showing that applying the requirements of this article would result in an unconstitutional taking of property or would result in any other unconstitutional result. The applicant shall set forth in detail the factual and legal basis for the claim, including all supporting technical documentation, and shall bear the burden of presenting the requisite evidence to demonstrate the alleged unconstitutional result. The city may assume each of the following when applicable:

(a) The applicant will benefit from the incentives set forth in the municipal code; and

(b) The applicant will be obligated to provide the most economical affordable housing units feasible in terms of financing, construction, design, location and tenure.

The approval authority, based upon legal advice provided by or at the behest of the city attorney, may approve a reduction, adjustment, or waiver if the approval authority determines that applying the requirements of this article would effectuate an unconstitutional taking of property or otherwise have an unconstitutional application to the property. The reduction, adjustment, or waiver may be approved only to the extent necessary to avoid an unconstitutional result after adoption of written findings, based on legal analysis and the evidence. If a reduction, adjustment, or waiver is granted, any change in the residential project shall invalidate the reduction, adjustment, or waiver, and a new application shall be required for a reduction, adjustment, or waiver pursuant to this section.

SECTION 2. FMC §8-22135 AMENDED.

Fremont Municipal Code Title VIII, Chapter 2, Article 21.3, Section 8-22135, subdivision (f), is amended to read as follows:

Sec. 8-22135. Condominium conversion; residential projects.

(a) – (e) [Text unchanged.]

(f) Requirements. Residential condominium conversion projects shall conform to applicable standards and requirements of local and state codes, the Subdivision Map Act, and the following:

(1) [Text unchanged.]

(2) Inclusionary housing. A residential condominium conversion with two or more residential units is subject to the inclusionary housing requirements of Article 21.7.

SECTION 3. CEQA.

Negative declaration. The City Council hereby determines that the Negative Declaration prepared for this ordinance has been completed in compliance with the requirements of the California Environmental Quality Act (CEQA) and reflects the independent judgment of the City; and finds that adoption of the ordinance will have no significant negative impact on the area's resources, cumulative or otherwise. The Director of Community Development shall file a Notice of Determination with the County Clerk in accordance with CEQA guidelines.

SECTION 4. SEVERABILITY.

If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held by a court of competent jurisdiction to be invalid, such a decision shall not affect the validity of the remaining portions of this Ordinance. The City Council of the City of Fremont hereby declares that it would have passed this Ordinance and each section or subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid.

SECTION 5. EFFECTIVE DATE.

This Ordinance shall take effect and will be enforced thirty (30) days after its adoption.

SECTION 6. PUBLICATION AND POSTING.

The City Clerk has caused to be published a summary of this ordinance, prepared by the City Attorney under Government Code Section 36933(c), once in *The Tri-City Voice*, a newspaper of general circulation printed and published in Alameda County and circulated in the City of Fremont, at least five days before the date of adoption. A certified copy of the full text of the ordinance was posted in the office of the City Clerk since at least five days before this date of adoption. Within 15 days after adoption of this ordinance, the City Clerk shall cause to be again published in *The Tri-City Voice* the summary of this ordinance with the names of those City Council members voting for and against the ordinance; and the City Clerk shall post in the office of the City Clerk a certified copy of the full text of this adopted ordinance with the names of those City Council members voting for and against the ordinance.

* * *

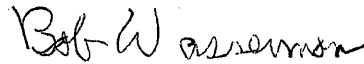
The foregoing ordinance was introduced before the City Council of the City of Fremont at the regular meeting of the City Council, held on the 1st day of June, 2010 and finally adopted at a regular meeting of the City Council held on the 15th day of June, 2010 by the following vote, to wit:

AYES: Mayor Wasserman, Vice Mayor Wieckowski, Councilmembers
Natarajan, Harrison and Chan

NOES: None

ABSENT: None

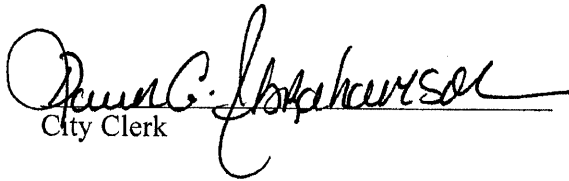
ABSTAIN: None

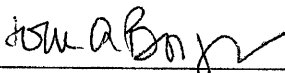


Mayor

ATTEST:

APPROVED AS TO FORM:


City Clerk


Assistant City Attorney